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CHARLES ELMORE CRO
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

In the Matter

of

The Petition of SPENCER KELLOGG & SONS, INC., as Owner of the Motorboat "LINSEED KING", her engines, etc., for Limitation of Liability, Civil and Maritime.

SPENCER KELLOGG & SONS, INC.,
Petitioner,

HILDA M. HICKS, as Administratrix, and others,
Claimants-Respondents.

THE PETITION OF SPENCER KELLOGG & SONS, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

D. ROGER ENGLAR,
CHAUNCEY I. CLARK,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Counsel for Petitioner,
Spencer Kellogg & Sons, Inc.

THE COURT PRESS, INC., N. Y. C.

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The Petition of SPENCER KELLOGG & SONS, INC., as Owner of the Motorboat "LINSEED KING", her engines, etc., for Limitation of Liability, Civil and Maritime.

SPENCER KELLOGG & SONS, INC.,

Petitioner,

HILDA M. HICKS, as Administratrix, and others,

Claimants-Respondents.

The Petition of Spencer Kellogg & Sons, Inc., for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Spencer Kellogg & Sons, Inc., owner of the motor launch "Linseed King", respectfully shows to the Court as follows:

Nature of the Case.

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, to review its decision affirming a decree of the United States District Court for the Southern District of New

York. The decision of the Circuit Court of Appeals was filed July 24, 1931, and appears at page 2365 of the record. The opinion of the Circuit Court of Appeals has not been officially reported. The opinions of the District Court are found at pages 122, 180 and 225 of the record. The first of these opinions is officially reported at 24 F. (2d) 967. The second of these opinions is officially reported at 48 F. (2d) 311. The third of these opinions is not officially reported.

This is a proceeding by the petitioner, as owner of the motor launch "Linseed King" to limit its liability for damages caused as a result of the sinking of this launch in the North River, New York Harbor, opposite 96th Street, Manhattan, on December 20, 1926, causing the loss of many lives and giving rise to numerous claims by survivors for personal injuries.

The District Court held that the petitioner was liable for this disaster; that the petitioner had not established that the disaster had occurred without its knowledge and privity, and, therefore, could not limit its liability to the value of the launch, which was negligible (R. 123-141); that the regular employees of the petitioner, engaged in non-maritime work, could not recover in this proceeding, but should be remitted to their claims under the New Jersey Workmen's Compensation Act (R. 180-196); that certain men who had been engaged for the first time a day or two before and were coming to work on the day of the disaster were not subject to the New Jersey Workmen's Compensation Act and could recover in this proceeding (R. 196-197). In addition, claims were filed by a number of men (or their personal representatives) who were admittedly non-employees. The final decree awarded damages to all the claimants excepting the regular employees.

The Circuit Court of Appeals affirmed the decree of the District Court.

I.

The first question presented is as follows:

Should a corporate owner of a motor launch used for transportation of its employees be denied the right of limitation of liability under the Act of March 3, 1851, and the acts amendatory thereof and supplementary thereto, with respect to claims arising out of the sinking of such vessel as a consequence of navigation through ice and contact therewith, when such owner has employed an experienced, competent master to navigate such vessel and has given positive instructions to the master not to navigate the vessel through ice and the disaster has resulted from violation on the part of the experienced and competent master of the owner's instructions?

The Circuit Court of Appeals, affirming the decision of the District Court, held that under such circumstances the right of limitation of liability should be denied; that in view of the serious possible consequence of such violation of the owner's instructions "it was not enough to leave the decision to a competent subordinate"; that the owner's plant manager "was bound to the most elaborate precautions, even if it involved going along himself"; that "what he should not have done was to leave the decision to the judgment of Rohweder" (the competent master); and "that the Company has not shown Stover (the plant manager) free from fault" (R. 2370).

The petitioner is a New York corporation engaged in the manufacture of linseed oil, with its principal place of business in Buffalo, where its chief executive officers

reside. It has, among others, a factory located at Edgewater, New Jersey, on the west shore of the Hudson River, opposite 96th Street, Manhattan, whence a number of its workmen come. In order to carry its workmen across to its factory, it maintained a motorboat called the "Linseed King", a gasoline launch 45 feet long with a beam of 10 feet. The launch had a small wheelhouse forward slightly raised above the floor of the enclosed cabin, which occupied most of the deck space. The sides of the cabin were glass windows, nine on each side, two at each end being hinged for ventilation, the others being held in place by turn buttons. There were two doors, one on each side just aft of the wheelhouse leading from the cabin to the deck. A third double door opened on the deck at the after end of the cabin. A short companionway led to each door. Along each side of the cabin ran a seat capable of holding about 18 men. The launch was equipped with 80 life preservers and several life rings. Over 80 men had been carried on the launch at times (R. 2365-6). On the occasion of the accident, the District Court found there were 78 men on board (R. 134), and this finding was accepted by the Circuit Court of Appeals (R. 2366).

It was the custom of the Company to send the launch from Edgewater in the early morning to receive workmen at the Manhattan shore and carry them back to the factory before work began. The vessel was of sound wooden construction, but without protection against ice, and it was recognized by the officers of the corporation that it would be unsafe for the vessel to be navigated with passengers through such ice as sometimes appears in New York Harbor in the winter time. Accordingly, orders were issued by the Secretary of the petitioner (Aldrich) from Buffalo to the Works Manager of the Edgewater Plant (Stover) and in turn to the experienced

and competent master of the launch (Rohweder), that running the vessel when there was ice in the river was forbidden.

The finding of the District Court on this point is as follows:

> "The undisputed evidence of various witnesses, including Rohweder, Stover, the works manager, and Balz, shows that instructions were given her operators that running her when there was ice was forbidden; and she would be laid up, when ice appeared, until spring. Rohweder also testified that Balz was his immediate superior and he was told by him and by Stover, the manager of the plant, not to run when ice appeared, in heavy fog, or in stormy weather, and, moreover, not to carry any more men than there were life preservers. Stover had received such instructions from Aldrich, the secretary of petitioner" (R. 129, 130).

These findings were accepted by the Circuit Court of Appeals, which described Rohweder as "an experienced" (R. 2366) and "competent" (R. 2369) man, continuing:

> "He had instructions from Stover not to press through ice, and if these were enough, it is impossible to charge his superior with fault" (R. 2369).

The appearance of ice in New York Harbor is quite uncertain and varies considerably with wind and weather conditions (R. 857-861, 1318-9).

However, as the first crossing of the river by the launch in the morning was by the captain alone from Edgewater to New York, when an adequate observation could be made, there was no danger of the launch unexpectedly encountering ice while laden with passengers (R. 2366, 390, 1821).

On the occasion of this disaster the launch left the Jersey shore before daybreak in charge of Rohweder, an experienced man. As Rohweder approached the New York shore he met drift ice which had come down the river on the tide during the night, driven upon the east shore by the wind. He pushed through this ice and at the Manhattan pier found a crowd of workmen waiting to be ferried across. Approximately 77 men were taken on board. The launch then got under way and successfully passed through the thicker part of the ice upon her return. When Rohweder thought himself clear and while at a speed of some 7 miles an hour, the launch struck a cake or floe of ice which stove a hole in her port bow about 8 x 16 inches. The launch at once began to fill and sank in about two minutes. In the interval, the workmen fell into a panic, scrambling for the outlets, through which many escaped. Although there were 80 life preservers on board, they were not used, owing, doubtless, to the panic which prevailed. Nevertheless, many of the men on board, after jumping or being precipitated into the water, reached floating cakes of ice or clung to the wreck, and were eventually rescued (R. 2366-7).

The action of Rohweder in taking on passengers and attempting the return trip through the ice was a clear violation of his orders and the instructions of the officers of the Company. This action has been held by both

courts to be the primary cause of the disaster. Nevertheless, the Circuit Court of Appeals held that the instructions to the master of the launch, not to navigate through ice, were not sufficient to relieve his superiors. The Court said, "whatever may be the practice in New York Harbor", it was apparent that the results of any accident would be likely to spread panic and cause death or injury to those on board; that if employers are justified in undertaking such transportation at all, "they must use the greatest of possible care" and that "chances must be ruled out, though remote" (R. 2369). The Court concluded:

> "Faced with such grave possibilities, it was not enough to leave the decision to a competent subordinate. It is difficult to excuse the failure entirely to suspend the service on Saturday when the ice had once appeared, but if we are to suppose that anything could justify its continuance, Stover was bound to the most elaborate precautions, even if it involved going along himself. Perhaps this was not necessary; possibly inquiries of the towing companies that morning would have served. What he should not have done was to leave the decision to the judgment of Rohweder. We hold that the company has not shown Stover free from fault" (R. 2370).

The reference to the appearance of ice on Saturday relates to a small amount of ice which appeared in the river on Saturday night, but returned up the river on the flood tide, leaving only traces inside pier heads on the New York side, as described by the claimants' witness, Fred Lang, who operated the "Linseed King" on Sunday morning (R. 1639). He did not report the appearance of this ice to anybody because there was no

danger (R. 1640) and "if there was ice in the river Monday morning when he came in, that would be up to the man who took the boat across Monday" (R. 1640-1). He admitted that he had been instructed not to run the boat if there was ice in the river (R. 1641).

The Circuit Court of Appeals clearly recognized that the petitioner had no actual knowledge that there was ice in the river on Monday morning when the "Linseed King" started out on her fatal voyage. In this connection, the Court said (R. 2369):

> "On that day, Saturday, ice came down below Ninety-sixth Street on the Manhattan shore, but by the weight of the evidence none was observed opposite Edgewater on Sunday, and we may take it that at sundown there was no reason to believe that the river was not clear at that point, though there was much ice not many miles above, with knowledge of which Stover was chargeable."

The accident occurred about 6:30 A. M. (R. 392) and there is not the slightest suggestion in the record that information could have been obtained from towing companies as to ice conditions at that time.

There is no question but that the instructions of the petitioner to the master of the "Linseed King" were given in good faith and intended to be obeyed. There were other means of transportation for the petitioner's employees to its plant at Edgewater via 125th Street ferry and bus, a route which a number of them took and which was always available. The launch was run for their convenience and saved them expense, as there was no charge for this transportation. That Captain Rohweder

was experienced and competent was admitted by the claimants at the trial (R. 299). There is no suggestion in the record of any reason for anticipation by the responsible officers of the petitioner that their orders would not be obeyed.

Counsel have been unable to find any other decision in the courts of the United States holding that after issuing positive instructions to a competent subordinate with respect to the performance of a definitely described act, the petitioner will be denied the right to limit liability for failure to take additional precautions to guard against violation of its definite orders issued in good faith. It may safely be said that the decision of the Circuit Court of Appeals is contrary to the law in all other circuits. It is definitely contrary to the decisions of this Court in interpreting the Limitation of Liability Act of March 3, 1851, as amended.

La Bourgoyne, 210 U. S. 95, 126-7;
Butler v. *Steamship Company*, 130 U. S. 527, 549;
Richardson v. *Harmon*, 222 U. S. 96, 105;
The City of Norwich, 118 U. S. 468;
The North Star, 106 U. S. 17;
The Scotland, 105 U. S. 24;
Craig v. *Continental Insurance Co.*, 141 U. S. 638, 646;

and to decisions in other circuits, as follows:

American Hawaiian Steamship Company v. *Pacific Steamship Company*, 41 F. (2d) 718 (C. C. A. 9);
Kitsap County Transportation Company v. *Harvey*, 15 F. (2d) 166 (C. C. A. 9);

Warnken, et al. v. *Moody,* 22 Fed. (2d) 960 (C. C. A. 5);
Standard Wholesale, etc. Works v. *Chesapeake Lighterage & Towing Co., Inc.,* 16 F. (2d) 765 (C. C. A. 4);
Quinlan v. *Pew,* 56 Fed. 111 (C. C. A. 1);
The North Star, 3 F. (2d) 1010 (D. C. Mass).

Reasons for Allowance of Writ on First Question.

I. The decision of the courts below, denying to the petitioner the right of limitation of liability for failure to take additional precautions to insure the obedience, by a competent subordinate, of instructions not to navigate petitioner's vessel when there was ice in the river, presents a serious question of great public interest and seriously cuts down the benefits of the Limitation of Liability Act, provided by Congress for the encouragement of shipbuilding and the employment of ships in commerce.

The doctrine laid down by the Circuit Court of Appeals in the present case is that, where the possible consequences of a disaster are particularly serious, a corporate officer, higher in rank than the captain but (at least in this case) wholly unfamiliar with maritime affairs, must be physically present on the vessel in order to insure the Captain's obedience to the instructions issued in good faith by the corporation. This ruling amounts to a repeal of the Act of 1851 and the Acts amendatory thereof and supplementary thereto, in all cases where the consequences of a disaster may be especially serious, *i. e.,* in all cases where these Acts are really important.

II. The decision of the courts below is in conflict with the decisions of this Court and of the Circuit Courts of Appeals in other circuits.

II.

The second question presented is as follows:

When men have applied to an employer for work, been accepted by the employment office, given time card stubs with identifying pay-roll numbers and told to report for work contingent on the arrival of certain raw material, are these men employees while travelling to the employer's plant pursuant to the employer's instructions on a conveyance furnished by the employer on a day when the raw material has arrived and work is immediately available; and are injuries or death sustained in the course of such transportation, sustained in the course of their employment within the meaning of the New Jersey Workmen's Compensation Act?

The passengers on the "Linseed King" at the time of this disaster were divided into three classes:

1. Regular employees who had previously performed services at the petitioner's plant.

2. Certain men who had applied at the petitioner's plant for work on the Friday and Saturday preceding the day on which this disaster occurred (Monday), had been interviewed at the employment office, had been accepted for employment, their names entered on the Company's pay-roll and had been given time card stubs with time clock numbers. These men were employed as laborers for performing the extra work entailed

at the plant upon the arrival of a "seed ship" bearing raw materials. The seed ship did not arrive on Saturday nor on Sunday morning and the men were without employment on these days. The ship had arrived on Sunday afternoon and started discharging, and work actually awaited these men at the plant on Monday morning upon their arrival there.

3. Applicants for work and others who had not previously visited petitioner's plant.

With respect to the claims arising out of death or injury to the regular employees (Class 1), excepting Roberts whose employment was regarded as maritime, both courts held that the New Jersey Workmen's Compensation Act applied and furnished the sole remedy for the claimants, and referred these claimants to the New Jersey Workmen's Compensation Commission for their redress (R. 195, 2370). As to claims arising out of death or injury to individuals in class 3, the New Jersey Workmen's Compensation Act was clearly inapplicable and the claims were allowed and awards made in this proceeding.

Both courts held that, as to claims arising out of death or injury to individuals in class 2 (referred to as "Saturday men"), these men were not employees within the meaning of the Workmen's Compensation Act and such claims were allowed and awards made thereon in this proceeding (R. 197, 2371). The facts with respect to the employment of these men are clear and the decisions of the courts below are conclusions of law from those facts. It is with respect to the decisions of the lower courts as to the claims arising out of death or injury to individuals in this class that the petitioner also asks review by this Court.

The "Saturday men" had applied for work, had been accepted, had each been given the stub of a numbered card used in making up the payroll, and had been told to report at the dock on Monday morning to be transported to work on the "Linseed King". Work was awaiting them on their arrival at the factory at Edgewater (R. 1770).

On these facts, both the District Court and the Circuit Court of Appeals held, as a matter of law, that they were not employees at the time of the disaster—that the status of employer and employee had not yet commenced, since the disaster occurred on the vehicle on which they were being transported to work by the petitioner, before arrival at the place of work:

The Circuit Court of Appeals, in its opinion, said:

> "They were then (*i. e.*, on Saturday) assured of no work, of only a preference among those who might apply; at most any 'contract of hiring' was conditioned upon jobs, still unfilled, when they appeared" (R. 2371).

If this statement is considered as a "finding of fact", it was not concurred in by the District Court; and it is not merely unsupported by any competent evidence, but is contrary to the specific testimony of many witnesses. The decision that the Saturday men were not employees is a conclusion of law based on facts as to which (with the exception above noted), there is no dispute.

The decision of the Circuit Court of Appeals that the Saturday men were not employees,—that the status of employer and employee did not arise when they boarded the vehicle furnished by the petitioner to transport them to work,—is squarely in conflict with the decision of the

Circuit Court of Appeals for the Ninth Circuit in *Clemens Horst Company* v. *Hartford Accident & Indemnity Company*, 27 Fed. (2nd) 42. The decision is also in conflict with the rule recognized by this Court in *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158, and is not supported by any New Jersey State Court decisions.

The authorities will be discussed in the brief in support of the petition.

Reasons for Allowance of Writ on Second Question.

1. The irreconcilable conflict between the decision of the Circuit Court of Appeals for the Second Circuit in the present case and the decision of the Circuit Court of Appeals for the Ninth Circuit in *Clemens Horst Company* v. *Hartford Accident & Indemnity Company* should be settled by this Court.

2. Prior to the widespread adoption of Workmen's Compensation Statutes, the question of when the status of employer and employee commenced was not of great importance; liability for personal injury depended solely on negligence and if negligence were shown the relationship between the parties was immaterial, excepting when the fellow-servant defense was interposed. Under workmen's compensation statutes, however, negligence is largely immaterial,—liability for injury is based on status. The question when the status of employer and employee arises, accordingly becomes one of vital and widespread importance which has been increasingly considered by the courts. We submit that the question here presented is of sufficiently broad importance to justify this Court in reviewing the decision below, particularly as that decision is not merely in conflict with the above

mentioned decision of the Circuit Court of Appeals for the Ninth Circuit, but with other decisions referred to in the brief submitted herewith.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket "No. 427, October Term, 1930: In the *Matter of the Petition of Spencer Kellogg & Sons, Inc.*, as Owner of the Motor Launch 'Linseed King', her engines, etc., for Limitation of Liability, Civil and Maritime"; and that said decree of the United States Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court to the extent herein prayed for; and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

SPENCER KELLOGG & SONS, INC.

By D. ROGER ENGLAR,
Counsel for Petitioner.

Certificate of Counsel.

We hereby certify that we have examined the foregoing petition. In our opinion, the petition is well founded and the case is one in which the prayer of the petitioner should be granted by this Honorable Court. It is presented in good faith and not for delay.

D. ROGER ENGLAR,
LEONARD J. MATTESON,
Counsel for Petitioner.

IN THE

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OCTOBER TERM, 1931.

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The Petition of SPENCER KELLOGG & SONS, INC., as Owner of the Motorboat "LINSEED KING", her engines, etc., for Limitation of Liability, Civil and Maritime.

SPENCER KELLOGG & SONS, INC.,

Petitioner,

HILDA M. HICKS, as Administratrix, and others,

Claimants-Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your petitioner, Spencer Kellogg & Sons, Inc., respectfully shows to the Court as follows:

Nature of the Case.

The facts are fully stated in the petition. The opinion of the United States District Court (Hazel, *D. J.*) for the Southern District of New York (R. 122) rendered

on March 17, 1928, is officially reported in 24 F. (2d) 967. The opinion of the United States District Court (Patterson, *D. J.*) for the Southern District of New York (R. 180) rendered on December 17, 1930, is officially reported in 48 F. (2d) 311. The opinion of the United States District Court (Patterson, *D. J.*) for the Southern District of New York (R. 225) rendered on February 9, 1931, is not officially reported. The opinion of the United States Circuit Court of Appeals (R. 2365) rendered on July 24, 1931, is not officially reported.

Jurisdiction.

This is a suit within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction of this Court is invoked under Title 28, Chapter 9, Section 347 of the Judicial Code, as amended by Act of February 13, 1925, 43 Stat. 938, and under Article 3, Section 2 of the Constitution of the United States.

Specifications of Error.

I. The Circuit Court of Appeals erred in the following respects:

1. In denying to the petitioner the right of limitation of liability for damages arising out of the sinking of the motor launch "Linseed King" as a consequence of navigation through ice and contact therewith, although the petitioner had employed an experienced and competent master to navigate such vessel and had given positive instructions to the master not to navigate the vessel through ice, and in holding that in view of the serious

possible consequences of violation of petitioner's instructions "it was not enough to leave the decision to a competent subordinate" and that the owner's Plant Manager "was bound to the most elaborate precautions, even if it involved going along himself".

2. In holding that the men who had been employed on the previous Friday or Saturday (the so-called "Saturday men") were not employees of the petitioner at the time of the disaster, and that, accordingly (unlike the "regular employees"), they did not fall within the scope of the New Jersey Workmen's Compensation Law.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals denying the petitioner the right of limitation of liability although the disaster occurred as a result of violation by an experienced and competent master of the owner's instructions given in good faith and holding that in view of the serious possible consequences of violation of the owner's instructions "it was not enough to leave his decision to a competent subordinate"—is contrary to the decisions of this Court and of the Circuit Courts of Appeal in other circuits and should be reversed.

It has been uniformly held by this Court and by the Circuit Courts of Appeal in other circuits that the owner is not guilty of privity and knowledge with respect to a disaster which has occurred as a result of violation by a competent subordinate of the owner's instructions, or as a result of negligence in which the owner or the

managing officers in the case of a corporation do not themselves participate. In the case of *La Bourgogne*, 210 U. S. 95, this Court considered the right of the owner of the steamship "La Bourgogne" to limit liability with respect to a collision at sea as a consequence of which the steamship "La Bourgogne" sank with the loss of most of her passengers, officers and crew. It was found that the collision had resulted because of the fact that the master of "La Bourgogne" navigated his vessel at greater than moderate speed in fog. The owner had issued positive instructions to the masters of its vessels to observe the rules of the road and specifically to preserve a moderate speed in foggy weather, and to diminish the speed of the engines under such circumstances. This Court said:

> "The petitioner having shown the promulgation of regulations for the conduct of its business, which exacted a compliance by the captains of its vessels with the international rules, we think the burden of proving that the rules were not promulgated in good faith or that a willful departure from their requirements was indulged in, and was brought home to or countenanced by the petitioner, was cast upon the claimants, and that the court properly held that that burden was not sustained by the evidence" (pp. 126-7).

The suggestion of the Circuit Court of Appeals in the present case that the seriousness of the consequences which might result from possible violation by a competent subordinate, of the owner's positive instructions is ground for requiring additional precautions on the part of the owner to guard against positive violations, even to the point of requiring a responsible officer of

the corporation to go along himself, is entirely novel. Obviously such a view of the Limitation Act deprives a vessel owner of the benefits of the Act in any case in which the possible consequences may be regarded as serious. In such a case if the vessel owner (or one of its responsible officers) fails to go along himself or take equivalent precautions, the owner is guilty of privity and knowledge. On the other hand if the vessel owner (or one of its managing officers) does go along himself and fails to prevent the act which is to be guarded against, the owner is clearly guilty of privity and knowledge.

Can any case be imagined where the possible consequences of violation of the owner's orders would be more serious than in the case of "La Bourgogne", to which we have just referred? That vessel was laden with many passengers, a full complement of officers and a considerable crew. The vessel was not equipped with watertight bulkheads and after the collision sank in a very short time. The loss of life and property in that case was many times more serious than here. Yet this Court did not deem it open to question that where the owner had issued proper instructions to its competent officers, and the collision was brought about by their violation of the Company's rules and instructions, privity and knowledge did not exist and the owner was entitled to a limitation of its liability.

Similarly in the case of *American Hawaiian Steamship Co.* v. *Pacific Steamship Company*, 41 Fed. (2d) 718, decided by the Circuit Court of Appeals for the Ninth Circuit, the right of the owner of the Pacific Steamship Company, as owner of the steamship "Admiral Fiske", to limitation of liability was contested on the ground that

the master of the "Admiral Fiske" failed to comply with the provisions of the Seaman's Act of 1915, with respect to the division of watches at sea, and that the owner failed to use due diligence to make the "Admiral Fiske" safe at sea, in that unsafe and insufficient deck watches were maintained with the privity and knowledge of the Company.

The Circuit Court of Appeals said (p. 720):

> "The duty of complying with this statute was properly delegated to the master of the 'Admiral Fiske', under proper instructions from the company, and the company is not to be held blameworthy for failure to interfere with the division of watches actually made unless it is shown that it was apparent to those in authority that the instructions were not being complied with and that disciplinary measures were required."

The court referred to the close parallel between the question presented in that case and the question considered by this Court in the case of *La Bourgogne, supra.* The Circuit Court of Appeals expressly followed the decision of this Court in that case, quoting the language which we have quoted above. The court continued, as follows (p. 720):

> "The provisions of the statute permitting limitation of liability are to be liberally construed. *Providence & N. Y. S. S. Co.* v. *Hill Mfg. Co.*, 109 U. S. 578, 3 S. Ct. 379, 617, 27 L. Ed. 1038. And where the owner of a vessel has properly delegated duties with respect to her management to a competent person, and there is here no contention that the master of the 'Admiral Fiske' was not competent, something more is required in establishing

knowledge and privity as to violations of statutes or regulations than mere negligence as to discovering whether or not those duties have been properly carried out; some degree of actual knowledge or participation must be brought home to the owners. *La Bourgogne, supra*; *The Annie Faxon* (C. C. A.), 75 F. 312; *Kitsap County Transportation Co.* v. *Harvey* (C. C. A.), 15 F. (2d) 166, 48 A. L. R. 1420; *Petition of Canadian Pacific Railway Co.* (D. C.), 278 F. 180, 181" (pp. 720-1).

Similar decisions in other circuits are:

Quinlan v. *Pew*, 56 Fed. 111 (C. C. A. 1);
Warnken et al. v. *Moody*, 22 Fed. (2d) 960 (C. C. A. 5);
Standard Wholesale, etc. Works v. *Chesapeake Lighterage & Towing Co., Inc.*, 16 F. (2d) 765 (C. C. A. 4).

It is well settled, also, that the Act of 1851 was passed to encourage the building and operation of vessels and that it is to receive a fair and liberal construction to effectuate the evident intention of Congress.

In the *84-H*, 296 Fed. 427, 430, 431, the Circuit Court of Appeals for the Second Circuit said:

"The Limited Liability Act was passed for the encouragement of shipbuilding and the employment of ships in commerce, by providing that the owners of ships should not be liable beyond their interest in the ship and freight for the acts of the master and crew done without their privity or knowledge."

In *Butler* v. *Steamship Company*, 130 U. S. 527, 549, this Court said of the policy of the Act:

> "That ground is, that for *the encouragement of shipbuilding and the employment of ships in commerce*, the owners shall not be liable beyond their interest in the ship and freight for the acts of the master or crew done without their privity or knowledge," (Italics ours.)

and this language is quoted with approval in the case of *Richardson* v. *Harmon*, 222 U. S. 96, 105.

In the case of *Providence & New York Steamship Company* v. *Hill Manufacturing Company*, 109 U. S. 578, 588, this Court indicated that the law should be enforced "in a spirit of fairness, with a view to giving to ship owners the full benefit of the immunities intended to be secured by it". And this language was quoted with approval by this Court in the case of *La Bourgogne*, *supra*. This principle of interpretation of the Act has been universally applied by the courts.

In re Howard S. Gerken, unreported, decided August 16, 1927 (W. D. N. Y., Hazel, *D. J.*);
Butler v. *Boston Steamship Co.*, 130 U. S. 527;
The City of Norwich, 118 U. S. 468;
The North Star, 106 U. S. 17;
The Scotland, 105 U. S. 24.

Mere negligence of servants or employees of the ship owner will not defeat the right of limitation, which is only denied on the ground of the knowledge or privity

of the owner himself. In the case of *La Bourgogne, supra*, this Court said:

> "Without seeking presently to define the exact scope of the words privity and knowledge, it is apparent from what has been said that it has been long since settled by this Court that mere negligence, pure and simple, in and of itself, does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute" (210 U. S. 95, 122).

In the case of *The Oneida*, 282 Fed. Rep. 238, 241, the Circuit Court of Appeals for the Second Circuit stated the universally recognized rule as follows:

> "*The knowledge or privity that excludes the operation of the statute must be in a measure actual, and not merely constructive. It must be actual, in the sense of knowledge or authorization, or immediate control of the wrongful acts or conditions, or through some kind of personal participation in them. The Colima* (D. C.), 82 Fed. 665; *Quinlan* v. *Pew*, 56 Fed. 111, 5 C. C. A. 438; *The La Bourgogne*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973." (Italics ours.)

In the case of *The 84-H, supra*, at page 431, the same Court again stated the rule, as follows:

> "The privity or knowledge must be actual and not merely constructive. It involves a *personal participation of the owner in some fault or act of negligence causing or contributing to the injury suffered.* There must be some fault or negligence on his part or in which he in some way partici-

pates. *Lord* v. *Goodall, etc., S. S. Co.*, 4 Sawy. 292, Fed. Cas. No. 8506; *The Colima* (D. C.), 82 Fed. 665, 679." (Italics ours.)

In *The Colima*, 82 Fed., Judge Addison Brown, in construing the limitation statute, said, at page 679:

> "The object of this statute * * * was to abridge the liability of ship owners arising out of a merely constructive privity with their agent's acts by introducing the rule of limited liability prevailing in the general maritime law * * *. *The knowledge or privity that excludes the operation of the statute must therefore be in a measure actual, and not merely constructive;* that is actual through the owner's knowledge, or authorization, or immediate control of the wrongful acts, or conditions, or through some kind of personal participation in them." (Italics ours.)

Citations to this effect might be multiplied indefinitely. We shall merely give the references to a few of the pertinent cases:

American-Hawaiian S. S. Co. v. *Pacific S. S. Co.*, 41 Fed. Rep. (2d) 718;
Kitsap County Transportation Co. v. *Harvey*, 15 Fed. Rep. (2d) 166;
The North Star, 3 Fed. Rep. (2d) 1010;
Standard Wholesale, etc. Works v. *Chesapeake Lighterage & Towing Co., Inc.*, 16 Fed. Rep. (2d) 765.

We submit that the decision of the Circuit Court of Appeals is contrary to the decisions of this Court and to the decisions of the Circuit Courts of Appeal in other

circuits; that it effectually nullifies the benefits of the Limitation of Liability Acts provided by Congress for the encouragement of the building, ownership and operation of ships; that it failed to interpret the limited liability act in that "spirit of fairness, with a view to giving to shipowners the full benefit of the immunities intended to be secured by it", which this Court has laid down as the proper rule of interpretation; that it is based on the novel and untenable ground that seriousness of possible consequences of violation by a competent subordinate of the owner's positive instructions, requires personal supervision on the part of the owner of the acts in question; and that the decision of the Circuit Court of Appeals in this respect should be reviewed and reversed.

II.

The decision of the Circuit Court of Appeals that the "Saturday men" were not employees of the petitioner at the time of the disaster, is contrary to the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Clemens Horst Company* v. *Hartford Accident & Indemnity Company*, 27 Fed. (2nd) 42, and is wrong.

As pointed out in the petition submitted herewith, the "Saturday men" had, on Friday or Saturday prior to the disaster, applied for work at the New Jersey employment office of the petitioner, had been accepted, had been given time card stubs each with an identifying payroll number, and had been told to report for work on Sunday, at which time it was expected work would be available as the result of the arrival of a ship with a cargo of

linseed. The men reported on Sunday morning, but as the ship had not arrived they were told to report on Monday at the dock, for carriage to the Edgewater plant on the "Linseed King". They did so report and were killed or injured while being transported to work. The ship in question had arrived at the Edgewater plant and started discharging on Sunday afternoon.

It is settled law, both in New Jersey and generally throughout the United States, that the injury or death of an employee while being transported to or from work in a vehicle furnished for that purpose by the employer, arises "out of and during the course of" his employment, so as to bring him within the purview of a state compensation statute.

Soden v. *Public Service Transportation Company,* 4 N. J. Misc. R. 817, affirmed by the Court of Errors and Appeals in 103 N. J. L. 713 (1927);

Fisher v. *Tidewater Building Company,* 96 N. J. L. 193; 97 N. J. L. 324;

Fredman v. *Safier,* 5 N. J. Misc. 459;

DePue v. *Salmon Company,* 92 N. J. L. 550;

Scott v. *Bayne Bros.,* 85 N. J. L. 446;

Cicalese v. *Lehigh Valley R. R. Co.,* 75 N. J. Law 897;

Matter of Littler v. *Fuller Co.,* 223 N. Y. 369;

Donovan's case, 217 Mass. 76;

Dominguez v. *Pendois,* 46 Calif. App. 220 (hearing denied by Supreme Court);

Hackley-Phelps-Bonnell Co. v. *Industrial Commission,* 165 Wisc. 586;

Swanson v. *Latham & Crane,* 92 Conn. 87;

Harrison v. *Central Construction Co.*, 135 Md. 170;

Manchester St. Railway v. *Barrett*, 265 Fed. 557 (C. C. A. 1st Cir.).

The lower courts, being bound by the decisions of the New Jersey courts in this regard (*Quong-Ham Wah Co.* v. *Industrial Commission*, 255 U. S. 445; *Edward Hines' Trustees* v. *Martin*, 268 U. S. 458), accordingly held that the *regular employees* of the petitioner, *i. e.*, the employees who had previously worked at the petitioner's plant, were within the New Jersey Compensation Act, and their cases were dismissed.

As to the Saturday men, however, who were being transported to work for the first time, the lower courts held that they were not employees, the status of employer and employee not having arisen at the time of the disaster. The Circuit Court of Appeals held that these men still had the status of applicants for work, who were merely to be given a preference in the filling of whatever jobs might be available. This "finding" (if it can be considered as such) was not concurred in by the District Court; it was not merely unsupported by any competent evidence but is contrary to the undisputed testimony of many witnesses, including many of the claimants themselves.

Research has disclosed only two cases dealing with the specific question of when the status of employer and employee arises where a person has applied for employment, been accepted and has boarded a vehicle furnished by the employer for the purpose of transporting the employees to their place of work. Both of these cases, one decided by the Circuit Court of Appeals for the Ninth Circuit, and the other by the highest court of the State

of Connecticut, hold that the status arises when the employee boards the vehicle.

In *Clemens Horst Company* v. *Hartford Accident & Indemnity Company*, 27 Fed. Rep. (2) 42 (C. C. A., 9th Cir.) the plaintiff advertised for hop pickers to begin work at its ranch on September 1st. On August 29th, one Rogan and his wife agreed to pick hops commencing on September 1st at an agreed sum per pound, "and were to be transported by the plaintiff without charge from the railroad station at Salem to the hop yards * * *". While being so transported on August 29th (*two days before the work was to commence*), Rogan and his wife were injured. The Circuit Court of Appeals for the Ninth Circuit held that their employment had commenced at the time of the accident. The case involved a suit between the employer and his Insurance Company under a policy which covered employees of the plaintiff and turned on the question of whether or not Rogan and his wife were employees at the time of the accident. In legal principle this case is wholly indistinguishable from the case at bar and the decision of the Circuit Court of Appeals for the Ninth Circuit in that case is precisely contrary to that of the Circuit Court of Appeals for the Second Circuit in the case at bar.

A similar decision in a case even more clearly on all fours with the case at bar was made by the Supreme Court of Connecticut in *Sala* v. *American Sumatra Tobacco Company*, 93 Conn. 82. In that case the defendant, which was engaged in raising, harvesting and marketing tobacco, told the decedents:

> "that if they wanted work, to meet an automobile at the waiting-station in Thompsonville in the

> town of Enfield, the next morning, to be transported to the defendant's plantation in South Windsor."

The decedents complied with these instructions and were killed owing to an automobile accident on their way to the plantation. The court of last resort of the State of Connecticut sustained a claim for compensation, saying:

> "The relation that then existed between the women and the American Sumatra Tobacco Company was that of master and servant, and not that of carrier and passenger. At the time they were injured they were laborers in the employ of the Tobacco Company".

The opinion concludes as follows:

> "This being so, the case is like *Swanson* v. *Latham*, 92 Conn. 87, 101 Atl. 492, in which we stated (p. 91) that 'an injury received by an employee while riding, pursuant to his contract of employment, to or from his work in a conveyance furnished by his employer, is one which arises in the course of and out of the employment' ".

These two cases are in entire accord with the case of *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, a case involving the workmen's compensation law of Utah, in which this Court said (p. 158):

> "In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached."

In support of its decision that the Saturday men were not employees at the time of the accident, the Circuit Court of Appeals cited three New Jersey cases,

viz., *Coco* v. *Wilbur*, 104 N. J. L. 275, *Sabella* v. *Lloyd Brasiliero*, 86 N. J. L. 505, affirmed 87 N. J. L. 710 and *Fineberg* v. *Public Service Railway Company*, 94 N. J. L. 55.

We submit that none of these three cases has the slightest bearing on the present matter.

In *Coco* v. *Wilbur*, the defendant employer arranged for his agent to hire cranberry pickers and to have them begin work at the cranberry bogs on the morning of Monday, September 8, 1924. The agent hired a group of men, including one Coco, and directed them to proceed with him to the cranberry bogs in New Jersey on Saturday, September 6. It was agreed that Coco was to receive fifty cents per bushel for the cranberries which he picked. On Saturday evening, while on the premises of the employer, Coco was accidentally shot by a hunter. At the time of this accident he was not engaged in any work for his employer and was not on a vehicle furnished by the employer for the purpose of transporting him to work. The Court held—

> "that the accident did occur while he was engaged in his own pursuits, and that the accident was of such a nature that it could not be deemed to have been contemplated by a reasonable person as incidental to the employment had it occurred in the course of the employment".

This was the basis of the decision.

In the case at bar the accident did not occur while the Saturday men were engaged in their own pursuits, but on the contrary, while they were being transported to work on a vehicle furnished by the employer and pursuant to the employer's specific instructions. Fur-

thermore, it is obvious that the accident in the case at bar was an accident which any reasonable person would have contemplated as incidental to transportation by water. This latter fact is borne out by the decision in *Foley* v. *Home Rubber Company*, 89 N. J. L. 474, in which it was held that the New Jersey Compensation Act applied to the case of a man who lost his life through the sinking of the "Lusitania" while he was en route to Europe on his employer's business. That a man is not "engaged in his own pursuits" (to use the language of the *Coco* case), where he is being transported to work on a vehicle supplied for that purpose by the employer is obvious. If this were not so, then none of the many "vehicle" cases could have been decided as they were.

The case of *Sabella* v. *Lloyd Brasiliero*, 86 N. J. L. 505, involved the case of a longshoreman who was killed in New Jersey some two hours after he had started work. The employer's foreman, in Brooklyn, told the deceased to go to Jersey City, as the employer had a ship in dock and needed men to unload it. The deceased went to Jersey City, applied for work, was accepted and set to work and sustained an accident some two hours later which caused his death. The Court held that the contract of employment was made in New Jersey and quite properly held that he was not engaged until after he reached Jersey City. It is not apparent what bearing the *Sabella* case has on the case at bar, where the Saturday men had applied for work at the petitioner's employment office in New Jersey, had been accepted and been given a numbered stub of a payroll card and who were obeying instructions of the petitioner when they boarded the "Linseed King" on the morning of the disaster.

In *Fineberg* v. *Public Service Railway Company*, 94 N. J. L. 55, the plaintiff signed an application which read:

> "I hereby make application for a position as conductor in the service of the Public Service Railway Company with the full understanding that in the event of my securing employment I am to abide by such rules and regulations governing the employes as the management may from time to time establish. If employed I promise to loyally and faithfully serve the company", etc.

The plaintiff was then sent to a school of instruction and was later placed under an instructor upon a trolley car for the purpose of being taught how to operate it. During the period of his instruction he received no pay. On the third day of his instruction the car overturned and injured him. The New Jersey Court held that at the time of the injury he was not an employee. No other holding of course was possible, in view of the written application which he had signed, which contemplated employment only after his instruction had been completed and he had been appointed as a conductor.

We respectfully submit that none of these three cases relied on by the Circuit Court of Appeals are in any way in point and the *Coco* case (which is perhaps most nearly in point), did not go to the Court of Errors and Appeals. That decision accordingly is not binding on this Court as interpretative of the New Jersey Law, although it would of course be entitled to weight were it in point.

In conclusion we respectfully submit that where a man has applied for work, has been accepted and has boarded a vehicle furnished by the person to whom he applied for work for the purpose of being transported

to the place where the work awaits him, the status of employer and employee exists, at least from the time of boarding the vehicle. It has been specifically so held by the Circuit Court of Appeals for the Ninth Circuit and by the highest Court of the State of Connecticut in the two cases above cited and we respectfully submit that those cases are sound law and that the Circuit Court of Appeals for the Second Circuit in the present case erred in holding that the status of employer and employee did not exist between the petitioner and the "Saturday men" at the time of the disaster to the "Linseed King".

A.

The Rule Laid Down in Southern Pacific Co. v. Jensen, 244 U. S. 205, Does Not Prevent the New Jersey Compensation Act from Applying to the Saturday Men, Assuming That They Were Employees.

The Circuit Court of Appeals stated that it was unnecessary to pass on this point, in view of its decision that the Saturday men were not employees. As the District Court held that even if the "Saturday" men were employees, the rule of the *Jensen* case would prevent the Compensation Act from applying, we shall discuss the point briefly.

There were twenty (20) "Saturday men" killed or injured in the disaster. It was testified that these men were hired as general laborers and not as stevedores and as to all but two men this evidence is uncontradicted. As to *some* of these men, a *part* of their work

might have been on board the ship which had arrived with a cargo for the plant. Some of them would have worked on the dock and some (probably the majority) in the factory.

The *Jensen* case decided that where an employee is killed or injured on navigable water while engaged in maritime work, admiralty has exclusive jurisdiction and a state compensation statute cannot apply. The rule has no application unless the killed or injured employee, at the time of the accident, is engaged in maritime work.

Grant Smith-Porter Ship Co. v. *Rohde,* 257. U. S. 469;
State Industrial Commission v. *Terry & Tench Co., Inc. et al.,* 273 U. S. 639;
Millers Underwriters v. *Braud,* 270 U. S. 59.

In the present case, even if all of the "Saturday men" had been hired exclusively for stevedore work, they would not be within the *Jensen* case. Even as stevedores, part of their work (and probably all the work of some of them) would have been on the dock and not on the ship, and a stevedore injured on the dock is within a State compensation statute (*Industrial Commission* v. *Nordenholt,* 259 U. S. 263). An injury received while *going* to work must be within a state compensation statute, if an injury after arrival and while *engaged* in such work would be within the statute.

Furthermore, it is the *work* which the employee is doing when injured and not the nature of his general employment which is the test under the rule of the *Jensen* case.

In *Alaska Packers Association* v. *Industrial Accident Commission*, 276 U. S. 467, a man named Peterson was injured while endeavoring to push a stranded boat into navigable waters. Peterson was employed by a fishing and canning company as a seaman, fisherman and for general work in and about a cannery. In holding that his case fell within the State Compensation Law (and not within the *Jensen* case), this Court said (p. 469):

> "Whether in any possible view the circumstances disclose a cause within the admiralty jurisdiction, we need not stop to determine. Even if an affirmative answer be assumed the petitioner must fail. Peterson was not employed merely to work on the bark or the fishing boat. He also undertook to perform services as directed on land in connection with the canning operations. When injured certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law."

The case of the "Saturday men" falls squarely within this decision.

The "Saturday men" were doing no *work* (maritime or otherwise) at the time of the accident. There is, of course, a clear distinction between work and employment. As said in *Swanson* v. *Latham*, 92 Conn. 87, 90:

> *"The work began when the decedent reached Stafford Springs; the employment began when the decedent boarded the automobile at Willi-*

> *mantic* and continued during the trip and during the work and on the return trip to Willimantic."

Similarly this Court in *Bountiful Brick Co.* v. *Giles*, 276 U. S. 154, 158, said:

> "In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached."

The maritime *situs* of an accident during transportation to work, cannot be coupled with the maritime nature of the work which *might have* been performed had the transportation been completed, so as to bring the matter within the *Jensen* case. On the facts here involved, however, the question does not arise as to the great majority of the "Saturday men". The evidence, as to all but two of them, is clear that they were hired as "laborers" to work principally in the plant; their work would have been, at most, only partly maritime; they were not doing maritime work when the accident occurred; and accordingly they are within workmen's compensation, under the *Alaska Packers* decision.

Conclusion.

In the present case the petitioner sought the protection of two remedial statutes, both of which were evidently intended to apply precisely to this type of case. The Federal Act for the Limitation of Shipowner's Liability has been held wholly inapplicable; and the New Jersey Workmen's Compensation Statute has been held

inapplicable to a large number of men who unquestionably were, in the ordinary sense, employees. We submit that the decision in this case illustrates the reluctance of the courts to apply remedial statutes in any case where this will result in the denial of damages to a large number of people, arising out of a major catastrophe. Plainly, however, it is just this sort of case in which remedial statutes are important, and we submit that their scope should not be whittled down by any narrow and technical construction. As has so often been said, hard cases make bad law. We submit that both of the statutes involved in this case have been narrowly and technically construed in the lower courts; and that their decisions are erroneous, and should be reversed.

Respectfully submitted,

D. ROGER ENGLAR,
CHAUNCEY I. CLARK,
LEONARD J. MATTESON,
GEORGE S. BRENGLE,
Counsel for Petitioner,
Spencer Kellogg & Sons, Inc.